



Policy Brief

HOW MACEDONIA CAN KEEP PACE WITH EUROPEAN
STANDARDS FOR PREVENTION AND PROTECTION AGAINST
DISCRIMINATION

STUDIORUM

Centre for Regional Policy Research and Cooperation

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Summary

The adoption of the Law on Prevention and Protection against Discrimination regresses the protection from discrimination in the country instead of bringing it to a new level. The law does not reflect the spirit of the present time and society; it does not foresee future events; it is not clear; it will most probably face difficulties in the implementation; it is not in accordance with the legislative frame already in place in the country; nor does it foresee any kind of adjustments to accommodate the Law within this frame. The content of the Law is **not harmonized** with the European legislation, European values and present **minimum standards** for promotion of the principle of equality and prevention and protection against discrimination.

Main weaknesses of the adopted Law are as follows:

➤ Essential weaknesses:

- The object of the Law is not precisely defined;
- The Law has no defined purpose;
- The area of implementation of the Law is not precisely defined;
- The Law does not include all standard EU grounds of discrimination;
- The forms of discrimination as well as their definitions are not fully harmonized with the European ones;
- The Law contains a wide, imprecise list of exceptions from discrimination;
- The mechanism for protection foreseen in the Law is not precisely defined and will most probably face problems in practice; and
- The sanctions foreseen in the law are an insult to anti-discrimination.

➤ Technical weaknesses:

- The Law contains a list of definitions of terms used in the law which is confusing, containing within also terms which are not used in the text of the law at all;
- Legal institutes are being unnecessarily redefined, in spite of their definition in other laws; and
- The Law does not foresee any transitional provisions, preparatory activities for commencement of the implementation of the law, nor any deadlines for initiation and completion of these activities.

Introduction

This policy brief looks into the Law on Prevention and Protection against Discrimination (the Law) adopted by the Assembly of the Republic of Macedonia on 8 April 2010, and promulgated in the Official Gazette No. 50 on 13 April 2010¹. Following the debate developments first on the Draft Law², than the Amended Draft Law³, and as of April 8 on the adopted Law it is essential to go back to few basic and very important facts related to the subject of this Law and to the legal obligations the Republic of Macedonia has as an active subject in international law. Since this Law was procedurally marked with the sign of the European flag, the focus in this brief will be on whether and to what extent is the Law in accordance with European standards and regulations.

According to the Constitution of the Republic of Macedonia in 1991 (the Constitution), Republic of Macedonia (Macedonia) is obliged to fulfill its obligations steaming from international treaties ratified in accordance with the Constitution which "cannot be changed by law"⁴. Macedonia, as signatory to many international treaties for promotion, protection and advancement of Human Rights; as member of many international and regional organizations; as a Candidate country for membership in the European Union (EU), is bound to respect the minimum standards for prevention and protection against discrimination and promotion and implementation of the principle of equality, as a high principle for Human Rights protection, and at the same time is bound to aspire towards greater standards. Macedonia has this obligation towards all of its citizens.

The EU commitment for anti-discrimination is set in the EU founding treaties which are its corner foundations. With the adoption of Article 13 of the **Treaty of Amsterdam**, the EU gave the Council the authorization to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁵ With the Treaty of Lisbon, the EU formally raised protection of Human Rights to a level of general principle of the EU law.⁶ With this treaty, the EU gives legal force to the **Charter of Fundamental Rights of the European Union** (European Charter), and acceded to the **Convention for the Protection of Human Rights and Fundamental Freedoms** (European Convention). Aside from the founding treaties, the European minimum standards for anti-discrimination are set in the European directives⁷: Council **Directive 2000/43/EC** implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁸ and Council **Directive 2000/78/EC** establishing a general framework for equal

¹ Law on Prevention and Protection Against Discrimination [Закон за спречување и заштита од дискриминација]. Official Gazette of RM. No. 50/2010. 13 April 2010.

² Draft Law for Prevention and Protection Against Discrimination [Предлог-закон за спречување и заштита од дискриминација]. Assembly of RM. <<http://www.sobranie.mk/ext/exporteddocumentdownloadwindow.aspx?id=dc01d9dc-fc8f-4b87-bf41-bf9f792859f7&t=pdf>>. Accessed on: 20 March 2010.

³ Amended Draft Law for Prevention and Protection Against Discrimination [Дополнет предлог-закон за спречување и заштита од дискриминација]. Assembly of RM. <<http://www.sobranie.mk/ext/exporteddocumentdownloadwindow.aspx?id=b2aac564-1114-48c2-81f4-ec651931f425&t=pdf>>. Accessed on: 25 March 2010.

⁴ Constitution of the Republic of Macedonia [Устав на Република Македонија]. Official Gazette of the Republic of Macedonia. <<http://www.slvesnik.com.mk/WBStorage/Files/USTAV-mk.pdf>>. Accessed on: 15 March 2010. Art. 118.

⁵ Treaty of Amsterdam. European Parliament. <<http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>>. Accessed on: 16 March 2010. Art. 13.

⁶ Treaty of Lisbon. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>>. Accessed on: 16 March 2010.

⁷ Aside from Directives 2000/43/EC and 2000/78/EC with which this law is being harmonized with, other relevant directives for protection against discrimination and enforcement of the principle of equal opportunities are the Directives 2004/113/EC, 2006/54/EC and 76/207/EEC.

⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>>. Accessed on: 16 March 2010.

treatment in employment and occupation⁹. Due consideration must also be paid to the **Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**¹⁰ which is in procedure in the EU institutions.

Since the EU has anti-discrimination and equality as its general principles and adds vital importance to them, it demands the same treatment to the above by its Member States, as well as to the countries aspiring to EU membership. Thus, the euro-integrative processes led to adoption of anti-discrimination laws in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Romania and Serbia. The adoption of these laws brought "points" to these countries in their EU integration because they did comprise with the minimum standards of the EU.¹¹ Macedonia was one of the two countries in the region without such legislation (aside from Montenegro, where the adoption of such a law is underway). Macedonia should have utilized the advantage of having pre-existing regional experiences and should have extracted the best from it. Having in mind the social, cultural and economic proximity with these countries, it is a realistic expectation that the formulations adopted in these laws can be easily and successfully implemented in Macedonia. In that direction, Macedonia could have had a law that with its quality would be a forerunner in the region, and would have set a new regional standard in this area. However, it is still not too late to do this by amending the Law.

In view of keeping pace with the regional and international standards for protection against discrimination, aiming towards a law in accordance with European values, harmonized with European law, the following amendments and additions should be considered in order to improve the text of the Law:

1. Object and Purpose of the Law

It is necessary to revise the object of the Law. According to Article 1, the object of the law is prevention and protection against discrimination, as well as the establishment of a Commission for protection against discrimination (the Commission). This article lacks implementation of the principle of equality, as object of the law. It is necessary to add this in Article 1.

Paragraph 3 in Article 1 should be deleted. The Commission is main object of Chapter IV, and its legal entity is regulated in Article 16, paragraph 2. Thus, this paragraph should be deleted from Article 1 which has a purpose to regulate the general object of the law, since the paragraph has the purpose to regulate one of the objects of the law - the Commission.

The Law also lacks purpose that, in accordance with the European directives, should be establishing a framework for combating discrimination with a view of putting into effect the principle of equality.¹² The Law should be amended in this direction.

⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>>. Accessed on: 16 March 2010.

¹⁰ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Europa, Portal of the European Union. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:HTML>>. Accessed on: 15 March 2010.

¹¹ The preambles of the directives 2000/43/EC (recital 25) and 2000/78/EC (recital 28) point out that the directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favorable provisions, adding a note that the implementation of these directives should not serve to justify any regression in relation to the situation which already prevails in each Member State.

¹² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>>. Accessed on: 16 March 2010. Art. 1.; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Eur-lex, Access to

2. Implementation of the Law

Regarding the implementation of the Law, there are two articles entitled "Implementation of the law" within one same Chapter "General Provisions" (art. 2 and art. 4). This needs to be revised. The formulation of Article 4 should especially be reconsidered. This goes in line with the Opinion of the Venice Commission on one of the older drafts of the Law¹³, where it criticizes the limitation of the implementation of the law to a list of areas, recommending that this list be fully erased, calling upon the ECRI General Policy Recommendation Number 7 on National Legislation to Combat Racism and Racial Discrimination. This Recommendation foresees implementation of the provisions in **all areas**, and just notes the areas to which special attention should be paid, namely: employment; membership of professional organizations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services¹⁴. In line with this, a better solution might be to fully delete Article 4 and to add a paragraph to Article 2 stating that the implementation of the provisions of this Law will be in all areas. If the legislators insist on keeping this list in the Law, a possible solution might be to merge Articles 2 and 4 and to amend the content in a manner clearly stating that discrimination is strictly forbidden in all areas, numbering the areas to which it wants to devote special notice to.

Article 2 does not include the ratified international treaties, unlike Articles 1 and 3 which recall them. Having in mind these articles, as well as Article 118 of the Constitution, it is necessary to add ratified international treaties in this article as well after the words "Constitution and laws of the Republic of Macedonia". Also, it would be good to explicitly state here that the implementation of the Law will be in both the private and the public sphere.¹⁵

The list of exceptions of prohibition of discrimination is determined in Chapter III, Articles 13, 14 and 15. This list is too wide, thus when the Law is open for amendments, narrowing down this list has to be taken into consideration. This was part of the Opinion the Venice Commission gave to one of the versions of the draft law,¹⁶ and the list is now even wider than in that version of the law.

Article 14, item 6 defines "family" in a different manner than its legal definition until now, which was that family is "community of life of parents, children and other relatives, if they live in a joint household"¹⁷ as stated in Article 2 of the Law on the Family. In contrast to this, Article 14, item 6 excludes children and other relatives and limits the family to only two members - the spouses. Even more, main object of the Law on the Family is the family, thus making the redefining of this institute with another law unacceptable. Additionally, this is a non-standard exception when it comes to discrimination. The purpose of this provision could have easily been achieved as in recital 22 of the preamble 2000/78/EC, which states that "this Directive is without prejudice to national laws on marital status and the benefits dependent thereon"¹⁸.

European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>>. Accessed on: 16 March 2010. Art. 1.

¹³ Venice Commission. Opinion on the Draft Law on Protection Against Discrimination. <[http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)042-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)042-e.asp)>. Accessed on: 15 March 2010.

¹⁴ ECRI General Policy Recommendation Number 7 on National Legislation to Combat Racism And Racial Discrimination. European Commission against Racism and Intolerance. <http://www.centrodidittumani.unipd.it/a_tem/razzismo/coe/ecrirc7.pdf>. Accessed on: 17 March 2010.

¹⁵ The Helsinki Committee recommends this as well. Please see: Comments on the Draft Law on Prevention and Protection Against Discrimination [Забелешки на предлог Законот за спречување и заштита од дискриминација]. Helsinki Committee for Human Rights of the Republic of Macedonia. <<http://www.mhc.org.mk/WBStorage/Files/Zabeleski%20za%20diskriminacija.doc>>. Accessed on: 21 March 2010.

¹⁶ Venice Commission. Opinion on the Draft Law on Protection Against Discrimination. <[http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)042-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)042-e.asp)>. Accessed on: 15 March 2010.

¹⁷ Law on the Family [Закон за семејството]. Official Gazette of RM. No. 80/92, 9/96, 38/2004, 33/2006, 84/2008. Art.2.

¹⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>>. Accessed on: 16 March 2010. Preamble, recital 22.

The formulation of Article 15, item 1, needs to be amended, so as the part "foreseen by law, unless if the pregnant woman or mother does not want to use this protection and has notified the employer of this in a written form" will be deleted, and "in accordance with law" will be added.

It is necessary to unify the terminology used throughout the text of this law, as well as to unify it with the terminology used in other laws in Macedonia regarding the persons which are entitled to rights on grounds of belonging to a specific group. For example, in the Law, there are several terms used to refer to persons with disabilities. The following terms are mentioned: persons with disability, persons with intellectual and physical disabilities (art. 3, art. 5 and art. 15). The Law uses the term "minorities" in Article 15 (items 8 and 9). However, after the amendments to the constitution which resulted of the Ohrid Framework Agreement, it has been general practice to avoid the usage of this term in Macedonian legislation. In this manner, it is necessary to revise the terminology when it comes to the communities which are not majority in Macedonia.

3. Grounds of Discrimination

The Law foresees the following grounds of discrimination: "sex, race, color, gender, membership in a marginalized group, ethnical affiliation, language, citizenship, social background, religion or religious belief, other types of belief, education, political affiliation, personal or social status, intellectual and physical disabilities, age, family or marital status, property status, health condition, or any other ground foreseen by law or ratified international treaty."¹⁹

From an aspect of minimum international standards, this list contains a few deficiencies and a few un-standard international terms. From an aspect of harmonization with the EU law, this list is not harmonized with standard EU grounds of discrimination. We will look into the later aspect.

The founding treaties of the EU foresee as grounds for discrimination: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.²⁰ The European Charter prohibits discrimination on grounds of sex, race, color, ethnic or social origin, genetic features,²¹ language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.²² The Directives foresee as grounds of discrimination racial or ethnic origin,²³ religion or belief, disability, age or sexual orientation.²⁴ The Directive which is currently in procedure in the EU, prepared to be implemented in the area outside of the labor market, will protect the following grounds: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.²⁵ Additionally, the grounds of discrimination foreseen in the European Convention (to which the EU acceded), Protocol 12 and its explanatory report, as well as the case

¹⁹ Law on Prevention and Protection Against Discrimination [Закон за спречување и заштита од дискриминација]. Official Gazette of the RM. No. 50/2010. 13 April 2010. Art. 3.

²⁰ Treaty of Amsterdam. European Parliament. <<http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>>. Accessed on: 16 March 2010. Art. 13.

²¹ Considering non-stigmatization as a vital part of the combat against discrimination the European Charter foresees genetic features as grounds of discrimination. However, since in Macedonia there is an absence of basic debate on the contemporary grounds on discrimination, there can be no initiation of debates on one of the "future" grounds of discrimination.

²² European Charter for the Fundamental Rights of the European Union. European Parliament. <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>. Accessed on: 16 March 2010. Art. 21.

²³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>>. Accessed on: 16 March 2010.

²⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>>. Accessed on: 16 March 2010.

²⁵ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:HTML>>. Accessed on: 15 March 2010.

law of the European Court for Human Rights (ECtHR), also have to be taken into account. These are the grounds of discrimination set by the EU as **minimum level of protection**. In the process of harmonization, the law can introduce more grounds for protection, but it cannot present fewer grounds than already foreseen in the EU Directives. Macedonia, as a Candidate country for EU membership, must place all minimum grounds of discrimination in the Law.

If we do not open a debate on differences between terms used to refer to the grounds (such as whether to use conviction, belief or opinion) and in regrouping and renaming of grounds, than it is the sexual orientation as ground of discrimination that is part of European minimum standards, and is not foreseen in this law. The sexual orientation serves as grounds to protect heterosexuals, homosexuals, bisexuals and asexual from discrimination. Aside from the obvious importance the EU pays to protection of sexual orientation as protected grounds, it is not foreseen in this Law. Human Rights Watch,²⁶ Amnesty International²⁷ and other international non-governmental organizations²⁸, and Macedonian organizations²⁹, Human Rights activists³⁰ and university professors³¹, as well as EU representatives in the country³² have already alarmed about this serious deficiency. The absence of this ground, makes the Law un-harmonized with the EU grounds, as well as with grounds for discrimination that already exist in other laws³³ in Macedonia, and with the obligations which Macedonia has as an active subject in international law (this especially having in mind the European Convention, its Protocol 12 and the ECtHR case law). This is a serious deficiency of the law which must be timely amended by placing sexual orientation as one of the grounds in Article 3, before the EU progress reports present a negative assessment, before Macedonia gets sued in front of the ECtHR, as well as before this question arises in the reports of international and regional organizations which monitor the Human Rights situation in Macedonia.

²⁶ Letter to the Prime Minister of Macedonia. Human Rights Watch. <<http://www.hrw.org/en/news/2010/02/03/letter-prime-minister-macedonia>>. Accessed on: 06 March 2010.

²⁷ Amnesty International - Public Statement. Macedonia: Ensure protection from discrimination on the grounds of sexual orientation. 15 April 2010. <<http://www.amnesty.org/en/library/asset/EUR65/001/2010/en/c84d3130-e306-4a8e-8e72-68e9b11154d7/eur650012010en.pdf>>. Accessed on: 25 April 2010.

²⁸ Letter to the Prime Minister of Macedonia. ILGA Europe. <<http://www.ilga-europe.org/content/download/16189/101675/file/ILGA-Europe's%20letter%20to%20the%20Government%20of%20Macedonia-English.pdf>>. Accessed on: 17 March 2010.; and Comments on the Draft Law on Prevention and Protection Against Discrimination [Забелешки на предлог Законот за спречување и заштита од дискриминација]. Helsinki Committee for Human Rights of the Republic of Macedonia.

<<http://www.mhc.org.mk/WBStorage/Files/Zabeleski%20za%20diskriminacija.doc>>. Accessed on: 21 March 2010.

²⁹ Coalition "Macedonia Without Discrimination" and others. Request from the Government of the Republic of Macedonia as submitter of the Law for Prevention and Protection Against Discrimination [Барање до Владата на Република Македонија како предлагач на Законот за спречување и заштита од дискриминација].

<<http://www.mhc.org.mk/WBStorage/Files/Baranje%20za%20povlekuvanje%20na%20Zakonot%20za%20zastita%20od%20diskriminacija.doc>>. Accessed on: 17 March 2010.

³⁰ Zharko Trajanovski. Macedonia with Discrimination [Македонија со дискриминација]. Dnevnik, daily newspaper. 17 March 2010.; Also: Zharko Trajanovski. Zombifikacija. Dozens of Reasons Against Homophobia [Дузина причини против хомофобијата].

<http://jasnesumjas.blogspot.com/2010/02/blog-post_04.html>. Accessed on: 20 March 2010.

³¹ Prof. Ljubomir Frchkovski in: Stenograph Notes from the Twentieth Meeting of the Standing Inquiry Committee for Protection of Civil Freedoms and Rights in the Assembly [Стенограмски белешки од дваесеттата седница на Постојаната анкетна комисија за заштита на слободите и правата на граѓанинот]. Assembly of RM.

<<http://www.sobranie.mk/ext/exporteddocumentdownloadwindow.aspx?Id=c73e766c-d028-4bbb-ab59-a921b9a163ea&t=pdf>>. Accessed on: 17 March 2010.

³² Irina Gelevska. Fuere's Critique on the Law Against Discrimination [Фуере со критика за законот против дискриминација]. A1 Television. 25 February 2010. <<http://a1.com.mk/vesti/default.aspx?vestID=120306>>. Accessed on: 20 March 2010.

³³ Other laws which directly include sexual orientation as protected characteristic/ ground of discrimination in Macedonia are: Law on Protection of Patients' Rights [Закон за заштита на правата на пациентите], Official Gazette of RM. No. 82/2008, 12/2009 (art. 5, para.2); Law on Volunteering [Закон за волонтерство], Official Gazette of RM. No. 85/2007, 161/2008 (art. 9); Law on Labor Relations [Закон за работни односи], Official Gazette of RM. No. 62/2005, 161/2005, 139/2005, 44/2006, 66/2006, 16/2007, 57/2007, 206/2008, 161/2008, 63/2009, 114/2009, 130/2009, 149/2009, 10/2010 (art. 6, para.1); Law on Public Health [Закон за јавно здравје], Official Gazette of RM. No. 22/2010 (art.16, para.5).

4. Terms

This part will look into the forms of discrimination and their legal definitions, as well as the definitions for terms used in the law.

Regarding the definitions of forms of discrimination, it is recommended to revise the definition for direct discrimination, since it is unnecessarily complicated, making it also not in compliance with the definitions in the European directives. The simplest approach to this end would be to fully replicate the definition from the EU directives.

The Law regulates that forms of discrimination, among others, are also victimization and discrimination in access to goods and services. The European directives do not place victimization as one of the forms of discrimination, but in the part on Remedies and Enforcement,³⁴ unlike the Law where victimization is part of the Chapter II "Forms of Discrimination". Prof. Ljubomir Frchkovski, professor of International Human Rights Law, points out to this error, stating that victimization is not a form of discrimination, but it is a bearing related to discrimination.³⁵ It is necessary to also revise the definition of victimization, since it is not precise enough. It is recommended that the definition from the European directives is replicated into Article 10 and as such is moved in the chapter "Judicial Protection".

The purpose of Article 11 "Discrimination in access to goods and services" is also not clear, since Article 4, item 7 already regulates the Law to be applicable in the area of "access to goods and services". It is thus recommended that either Article 11 is erased, or a separate article is devoted to all areas numbered in Article 4.

Additionally, the Helsinki Committee calls on introduction of an article to regulate **hate speech**,³⁶ which seems to be a must taking into consideration Article 14, item 7.³⁷

In its Article 5, the Law defines the terms: affirmative measures, discrimination, person, architectural surrounding, marriage, equality, effective protection, legitimate (objectively justified) purpose, legitimate interest, marginalized group, adjustments of infrastructure and services. Article 5, item 2 contains a definition on "architectural surrounding", although this term is never mentioned in the law. The same goes for "legitimate interest", term defined in Article 5, item 10, but not once mentioned in the law (there is a mentioning of "justified interest", but not of "legitimate interest" as such). The definition of "equality" in item 6 of this article is confusing, since it speaks of "unequal people which are to be treated equally". It is necessary to revise this definition.

In brief, the definitions of terms are meant to serve as their clarifications, but instead, they add more confusion to the text of the Law. On this expense, the Law lacks definitions of the grounds of discrimination. The Law needs to be improved in this direction, and needs to foresee definitions of all grounds from Article 3. It is necessary for the definitions to clarify the terminology used in the

³⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>>. Accessed on: 16 March 2010.; and: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>>. Accessed on: 16 March 2010.

³⁵ Please see: Stenograph Notes from the Twentieth Meeting of the Standing Inquiry Committee for Protection of Civil Freedoms and Rights in the Assembly [Стенограмски белешки од дваесеттата седница на Постојаната анкетна комисија за заштита на слободите и правата на граѓанинот]. Assembly of RM. <<http://www.sobranie.mk/ext/exporteddocumentdownloadwindow.aspx?id=c73e766c-d028-4bbb-ab59-a921b9a163ea&t=pdf>>. Accessed on: 17 March 2010.

³⁶ Comments on the Draft Law on Prevention and Protection Against Discrimination [Забелешки на предлог Законот за спречување и заштита од дискриминација]. Helsinki Committee for Human Rights of the Republic of Macedonia. <<http://www.mhc.org.mk/WBStorage/Files/Zabeleski%20za%20diskriminacija.doc>>. Accessed on: 21 March 2010.

³⁷ Article 14, item 7 foresees that the exercise of the constitutionally guaranteed right of freedom of speech, public address, belief and public information will not be considered as discrimination. Please see: Law on Prevention and Protection Against Discrimination [Закон за спречување и заштита од дискриминација]. Official Gazette of RM. No. 50/2010. 13 April 2010. Art. 14, item 7.

text of the law, and it also has to be unified throughout the whole text. It is necessary to revise the definitions of the forms of discrimination and the definitions of the terms used in the Law.

5. Mechanism for Protection

According to the Law, a Commission will be formed having a capacity of a legal entity based in Skopje. It will be consisted of 7 members with a five year mandate and a possibility for one re-election, and one president elected from among its members with a one year mandate (art. 17). The Commission will be financed from the country budget, with a possibility for financing from other sources as well (art. 16, para. 3). The members of the Commission are entitled to monthly compensation of two average monthly salaries (art. 21). Assigned member of the Commission can be a person that is citizen of Macedonia, with a permanent residence in the country and high education and experience from the area of Human Rights and social sciences (art. 18).

Some changes are necessary in order for this body to be functional and to fulfill the minimum international standards³⁸. The pluralism of the Commission cannot be guaranteed only with a provision on appropriate and equitable representation (art. 19, para. 3), since that does not reflect the essence of the Paris Principles which explicitly demand pluralism through presence of representatives of: non-governmental organizations responsible for Human Rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations (for example, the Bar association); trends in philosophical or religious thought; Universities and qualified experts; Parliament; and representatives of government departments but only in an advisory capacity.³⁹ Elena Mihajlova, Assistant at the Law Faculty "Iustinianus Primus" draws attention to this same fact, underlying the necessity for adding more precise structure of the Commission, and the necessity this to be regulated in a law.⁴⁰

All administrative and technical work of the Commission, according to the Law, is the responsibility of the Commission itself (art. 30). This needs to be further specified. It is necessary to foresee the form and structure of the services that are to operate in support of the Commission. It is also needed to define their status (will they be considered civil servants or not). In Article 24 - the competences of the Commission - an explicit provision on cooperation of the Commission with representatives of the non-governmental sector which have legitimate interest to contribute to the combating discrimination on any of the grounds should be added.

An even larger deficiency, when compared to the EU directives, is the **burden of proof**. The EU directives demand that persons who consider themselves wronged because the principle of equal treatment has not been applied to them in particular, establish only facts from which it may be presumed that there has been discrimination. The Law, however, places a huge part of the burden in proving discrimination to the complainant, asking for submission of facts and proofs from which the act or action of discrimination can be established.⁴¹ Thus, this paragraph needs to be amended, having as a potential solution to this formulation that "in the complaint, the complainant should

³⁸ Principles relating to the Status of National Institutions (The Paris Principles). Office of the United Nations High Commissioner for Human Rights. <<http://www2.ohchr.org/english/law/parisprinciples.htm>>. Accessed on: 17 March 2010.

³⁹ Principles relating to the Status of National Institutions (The Paris Principles). Office of the United Nations High Commissioner for Human Rights. <<http://www2.ohchr.org/english/law/parisprinciples.htm>>. Accessed on: 17 March 2010.

⁴⁰ Elena Mihajlova. On Discrimination, Without Hysteria [*За дискриминацијата без хистеруја*]. Dnevnik, daily newspaper. 27 February 2010.

⁴¹ This is also emphasized by: Elena Mihalova (Please see: Elena Mihajlova. On Discrimination, Without Hysteria [*За дискриминацијата без хистеруја*]. Dnevnik, daily newspaper. 27 February 2010.) and Prof. Ljubomir Frchkovski (Stenograph Notes from the Twentieth Meeting of the Standing Inquiry Committee for Protection of Civil Freedoms and Rights in the Assembly [*Стенограмски белешки од дваесеттата седница на Постојаната анкетна комисија за заштита на слободите и правата на граѓанинот*]. Assembly of RM. <<http://www.sobranie.mk/ext/exporteddocumentdownloadwindow.aspx?Id=c73e766c-d028-4bbb-ab59-a921b9a163ea&t=pdf>>. Accessed on: 17 March 2010.).

present facts from which discrimination may be presumed". It is also necessary to establish the content of the complaint.

Further, Article 25, paragraph 3 foresees that in the Commission's procedure the persons living in units of local self-government where at least 20% of the population speaks an official language different from the Macedonian language, can use any of the official languages and their alphabets, regulating that the Commission will translate this complaints into Macedonian and will act on them as such. Having in mind the fact that the Commission has no regional offices, nor any procedures which are formally tied to the units on local self-government, it is not logical for the right to address the Commission on one's own mother tongue to be given only to those who live in units of local self-government where at least 20% of the population speaks a language other than the Macedonian language.⁴² Having in mind the essence and character of the Commission and of the procedure, this distribution of rights is completely unfounded and needs to be amended. **The right to communicate with the Commission in their own mother tongue should be given to all representatives of all ethnic communities in the country, regardless of residence within the country.**

It is necessary to establish the relations between the Commission's procedure and a judicial procedure. According to Article 26, paragraph 1 the Commission will not decide on complaint if a court procedure on the same matter is already initiated or is completed. This does not specify the criteria on which the Commission will in one case decide not to initiate a procedure since there is already a court procedure underway; while in another it will start a procedure, since there is no final court binding decision. Further on, it is not regulated how the Commission will proceed if the complainant initiates a court procedure, after the Commission has started a procedure on the same matter. The form and deadline for notifying the complainant on its decision not to initiate a procedure, is also not indicated.

The deadlines in the Law are either not fully specified or are not foreseen at all. As already stated, there is no deadline for the Commission to notify the person that it will not initiate a procedure. Article 31 regulates the obligation to provide information on cases of discrimination on demand of the Commission; however it does not foresee a deadline in which this information should be presented. There is such a deadline, but in the misdemeanor provisions in Chapter VII, Article 45. This deadline should be foreseen in Article 31, and not in 45. Also, considering the fact the Commission has no authorization to appoint temporary measures, the deadlines for the discrimination procedure can be considered to be rather long, this even more considering the delicate nature of the cases which are to be handled by the Commission.

According to the European directives⁴³ the sanctions must be effective, proportionate and dissuasive. Professors and Human Rights activists have pointed out⁴⁴ on several occasions that the amounts foreseen for the fines are a full blow to anti-discrimination. It is necessary to consider raising the

⁴² This will mean that, for example, the Roma from Shuto Orizari or the Albanians from Tetovo will be able to file a complaint to the Commission in their own mother tongue, while the same will not apply to the Roma from Veles or the Albanians from Bitola.

⁴³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>>. Accessed on: 16 March 2010. Art. 15. And: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>>. Accessed on: 16 March 2010. Art. 27.

⁴⁴ Zharko Trajanovski points out that the Government plans to spend on anti-discrimination as much as they plan to spend on the "hoofs of Bucephalus (Please see: Bucephalus' Hoofs Weight As Much As the Campaign on Non-discrimination [Копитата на Букефал тежат колку кампањата за недискриминација]. Dnevnik, daily newspaper. 21 February 2010. <<http://www.dnevnik.com.mk/default.asp?ItemID=6D7243A4495F6948A3114E40DE8F06B5>>. Accessed on: 15 March 2010.). While, Prof. Mirjana Najchevska compares these fines with throwing a bud on the street (Please see: Alibi Amendments for Protection Against Discrimination [Алиби-амандмани за заштита од дискриминација]. Dnevnik, daily newspaper. 19 March 2010. <<http://www.dnevnik.com.mk/?ItemID=0B6BA0E067216D4E892E1E64378DB093&arc=1>>. Accessed on: 20 March 2010.).

fines in order for them to reflect the burden of the misdemeanor, and to influence effectively and dissuasively towards the potential discriminators.

The Helsinki Committee calls on several other important and necessary amendments, such as giving the Commission the possibility to initiate complaints and to conduct investigations, as well as to the necessity to shorten the deadlines, and to impose mandatory initiation of procedure against an authorized body in case if a person, to which a recommendation has been issued, does not act upon it, as well as the necessity for judicial protection for cases of victimization.⁴⁵

6. Transitional and Final Provisions

The last chapter of the law foresees no transitional and final provisions, aside from the provision on the Law's entrance into force on 1 January 2011 (art. 46). Amendments to this part are needed. It is a necessity to foresee the deadlines in which the call for applications and the selection of members of the Commission will be executed, the timeframe for securing office space, technical and administrative conditions for work of the Commission. A deadline for the Commission to adopt its rulebook and other acts for internal organization should also be determined.

It also needed to define the legal implications of this Law, an issue that rose in the debate in a session of the Standing Inquiry Committee for Protection of Civil Freedoms and Rights in the Assembly.⁴⁶ Defining the relations with the Ombudsperson and distinguishing the competences of the Commission from those of the Ombudsperson is as well important.

7. Dialogue with the Non-governmental Organizations

The Law fully ignores the role, importance and potential for contribution of the non-governmental organizations in the area of anti-discrimination. As opposed to this, the EU considers the non-governmental sector to be its partner, especially in the areas of anti-discrimination and promotion, protection and advancement of Human Rights. The EU directives⁴⁷ state that Member States shall encourage dialogue with non-governmental organizations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds foreseen in the directives, with a view to promoting the principle of equal treatment. It is necessary to introduce the importance of the non-governmental organizations as partner in anti-discrimination. This can be placed in a special chapter "Dialogue with non-governmental organizations with legitimate interest" or in a chapter "Special Provisions".

⁴⁵ Comments on the Draft Law on Prevention and Protection Against Discrimination [Забелешки на предлог Законот за спречување и заштита од дискриминација]. Helsinki Committee for Human Rights of the Republic of Macedonia. <<http://www.mhc.org.mk/WBStorage/Files/Zabeleski%20za%20diskriminacija.doc>>. Accessed on: 21 March 2010.

⁴⁶ On legal and financial implications of the implementation of the Law, please see the opinions of Zharko Haxizafirov from Macedonian Young Lawyers Association and of Bojan Marichek from Foundation Open Society Institute - Macedonia in: Stenograph Notes from the Twentieth Meeting of the Standing Inquiry Committee for Protection of Civil Freedoms and Rights in the Assembly [Стенограмски белешки од дваесеттата седница на Постојаната анкетна комисија за заштита на слободите и правата на граѓанинот]. Assembly of RM. <<http://www.sobranie.mk/ext/exporteddocumentdownloadwindow.aspx?Id=c73e766c-d028-4bbb-ab59-a921b9a163ea&t=pdf>>. Accessed on: 17 March 2010.

⁴⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>>. Accessed on: 16 March 2010. Art. 12; And: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Eur-lex, Access to European Union Law. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>>. Accessed on: 16 March 2010. Art. 14.

It would be also good to regulate the possibility for execution of situation testing⁴⁸ in a "Special Provisions" chapter. Their usage as evidence material should also be referred to.

Conclusion

In comparison with its neighbors and the EU Member States, Macedonia is lagging behind in the field of promotion and advancement of the principle of equal treatment and anti-discrimination. This Law was intended as step forward towards the euro-integration of the country. However, the un-harmonized and fragmented legal act, as shown herewith and in many other sources will have a contrary effect.

This Policy Brief aims to point at some of the amendments the Law has to undergo in order to bring it closer to the European and regional standards for protection against discrimination. In accordance with the messages coming from the EU, and having the suggestions in this policy brief as sources for possible solutions the European directives, the draft-law of November 2009 on which the government and the NGO sector⁴⁹ worked together for almost two years, the comments from the ODIHR,⁵⁰ the Venice Commission⁵¹ and the Helsinki Committee,⁵² **it is recommended that the Government of the Republic of Macedonia immediately prepares a Draft-law for amending the Law on Prevention and Protection against Discrimination, and that the Assembly supports the adoption of that Draft-law.**

⁴⁸ "Situation testing is a method according to which pairs (of applicants for accommodation or a job vacancy or clients of a restaurant, a nightclub, etc.) are established in such a way that they differ solely on the basis of a single characteristic reflecting the discriminatory ground (gender, ethnicity, age, disability, religion or belief, sexual orientation) under scrutiny. If one of the members of the pair faces different treatment, the distinction points to discriminatory behavior." Situation Testing. Migration Policy Group.

<http://www.migpolgroup.com/projects_detail.php?id=25>. Accessed on: 17 March 2010. For more on situation testing, please see: Proving Discrimination Cases - the Role of Situation Testing. Migration Policy Group.

<http://www.migpolgroup.com/public/docs/153.ProvingDiscriminationCases_theRoleofSituationTesting_EN_03.09.pdf>. Accessed on: 17 March 2010.

⁴⁹ Other statements, comments and opinions from the civil society on the legislative frame for protection from discrimination can be found on: Comments of FOSIM on the Draft Law for Prevention and Protection Against Discrimination [*Коментари на ФИОМ за Предлог - законот за спречување и заштита од дискриминација*]. Foundation Open Society Institute - Macedonia.

<<http://www.soros.org.mk/dokumenti/komentari-na-predlog-zakonot-za-specuvanje-i-zastita-od-diskriminacija.pdf>>. Accessed on: 21 March 2010.

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⁵⁰ Comments on the Draft Law on Prevention and Protection Against Discrimination of the Former Yugoslav Republic of Macedonia. Office for Democratic Institutions and Human Rights. 13 October 2009. <<http://www.legislationline.org/documents/id/15682>>. Accessed on: 17 March 2010.

⁵¹ Venice Commission. Opinion on the Draft Law on Protection Against Discrimination. <[http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)042-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)042-e.asp)>. Accessed on: 15 March 2010.

⁵² Comments on the Draft Law on Prevention and Protection Against Discrimination [*Забелешки на предлог Законот за спречување и заштита од дискриминација*]. Helsinki Committee for Human Rights of the Republic of Macedonia.

<<http://www.mhc.org.mk/WBStorage/Files/Zabeleski%20za%20diskriminacija.doc>>. Accessed on: 21 March 2010.

Matrix of suggested amendments to the Law on Prevention and Protection against Discrimination

Article from the text of the Law	Suggested amendment	Note
Chapter I: General Provisions		
Article 1	Paragraph 1: add implementation of the principle of equality as object of the law.	<ul style="list-style-type: none"> - Essential link between anti-discrimination and principle of equality. - Harmonization with the EU Directives.
	Paragraph 3: to delete.	Article 16, Paragraph 1 regulates this.
Article 2	<ul style="list-style-type: none"> - Amend with "ratified international treaties" as sources of rights and freedoms for the citizens of Macedonia. - Merge with Article 4. 	<ul style="list-style-type: none"> - Constitution of RM, Article 118. - Nomotechnical necessity.
Article 3	<ul style="list-style-type: none"> - Amend by adding sexual orientation as grounds of discrimination. 	<ul style="list-style-type: none"> - Harmonization with the EU Directives. - Domestic Legislation: Law on Labor Relations; Law on Protection of Patients' Rights, Law on Volunteering, Law on Public Health, etc.
Article 4	<p>After "legal and natural persons" amend by adding "in all areas. Notably:". This amendment is connected to another amendment: after item 8 add "and", while the "and" after item 9 as well as item 10 should be deleted.</p> <p>Merge this article with Article 2.</p>	<ul style="list-style-type: none"> - In line with ECRI's recommendations.
Article 5	Item 2: to delete.	The item refers to a term not used in the law at all.

Article from the text of the Law	Suggested amendment	Note
	Item 10: to delete.	The item refers to a term not used in the law at all.
Chapter II: Forms of Discrimination		
Article 6	Paragraph 1: To revise the definition on direct discrimination.	- Harmonization with the EU Directives.
Article 8	Synchronize the terminology used to refer to people with disabilities.	The Law uses several different terms.
Article 10	To revise the definition on victimization. To move victimization in Chapter VI: Judicial Protection.	- Victimization is not a form of discrimination, but an bearing related to discrimination. - Nomotechnical necessity is to move the definition to Chapter VI once it is revised.
Article 11	Option 1: Delete Article 11 Option 2: Foresee a special article for all items listed in Article 4.	Already foreseen in Article 4, item 10.
General remark on necessary amendments of the Chapter: To harmonize the definitions with the ones in the EU directives, and to harmonize the list of definitions of terms used in the law with the ones actually used in the law.		
Глава III: Exceptions from Discrimination		
Article 14	Item 6: To revise.	Unnecessary re-defining of a legal institute that is primary object of the Law on the Family.
	Item 7: Specify item 7 with an article on "hate speech".	It is necessary to specify this exception with a special article on "hate speech".
Article 15	Item 1: Revise item 1 so that the part "foreseen by law, unless if	The provision, as it is

Article from the text of the Law	Suggested amendment	Note
	the pregnant woman or mother does not want to use this protection and has notified the employer of this in a written form" will be deleted, and "in accordance with law" will be added.	transposed from other laws, does not present clearly what will be and what won't be considered as discrimination.
	Item 8: Revise item 8.	The term "minorities" should be replaced by "representatives of communities not in majority in RM".
	Item 9: Revise item 9.	The term "minorities" should be replaced by "representatives of communities not in majority in RM".
General remark on necessary amendments of the Chapter: The list of exceptions is too wide. It is necessary to narrow it down by specifying, regrouping and rephrasing of the exceptions in only several short, clear and precise exceptions.		
Chapter IV: Commission for Protection Against Discrimination		
Article 19	Specify with guarantees on pluralism of the Commission.	To this end, paragraph 3 cannot suffice. It is necessary to guarantee pluralism of the content of the Commission in other directions as well (representatives from the NGO sector, from professional organizations, etc).
Article 24	Amend by adding an explicit provision on cooperation with representatives from the NGO sector.	<ul style="list-style-type: none"> - Harmonization with the EU Directives. - The Government, as well as all other institutions which work in the anti-discrimination area must have the NGO

Article from the text of the Law	Suggested amendment	Note
		sector as its partner.
Chapter V: Proceedings for prevention and protection against discrimination to the Commission		
Article 25	Paragraph 3: It is necessary to amend by adding right to address to the Commission in their own mother tongue to all representatives from all communities in Macedonia.	The procedure in front of the Commission is not in any way related to the units of local self-government, thus making it obsolete and illogical to relate this right to the part of Macedonia's territory where it lives.
Article 26	Paragraph 1: specify with criteria on which the Commission will be decide when it will initiate proceedings if a court proceeding is already under way but a final court decision is not yet made.	Incomplete provision which might result in unequal treatment in practice later on.
	Paragraph 2: amend by adding provisions on the form and deadlines in which the Commission will notify the complainant that it will not initiate proceedings.	It is necessary for the complainant to know how and in what time frame she/he will be notified of this.
Article 30	Specify the structure and number of services assisting the Commission. Specify whether they will have a civil servants status.	Aside from the content of the Commission, it is necessary to determine also the structure and number of its services.
Article 31	There is no deadline for providing these information. The deadline is mentioned in Article 45. Foresee the deadline in this Article as well.	The deadline is stated only in the misdemeanor provisions, but not in the part where this subject is being addressed.

Article from the text of the Law	Suggested amendment	Note
Chapter VI: Judicial Protection		
Article 38	The burden of proof needs to be revised. A mere establishment of only facts from which it may be presumed that there has been discrimination must be enough.	<ul style="list-style-type: none"> - The burden of proof, as in the law, places huge part of the burden of proving discrimination on the complainant. - Harmonization with the EU Directives.
Chapter VII: Misdemeanor provisions		
Article 45	Article 45: the deadline foreseen in this article has to be mentioned also in Article 31.	It is necessary to mention the deadline from this article into Article 31.
General remark on necessary amendments of the Chapter: To revise the amounts of the foreseen fines.		
Chapter VIII: Transitional and Final Provisions		
General remark on necessary amendments of the Chapter: <ul style="list-style-type: none"> - Foresee the legal implications of the law; - Foresee deadlines for publishing call for applications for members of the Commission; - Foresee deadline for providing office, technical and administrative conditions for the work of the Commission; - Foresee deadlines for adoption of the acts for internal work of the Commission; and - Regulate the relations with the Ombudsperson. 		
Other amendments: Chapter "Special provisions"		
It is necessary to amend the text of the law by adding a chapter on "Special Provisions" that will regulate: <ul style="list-style-type: none"> - Dialogue with the NGOs (a possible solution might be to foresee a whole separate chapter to this end); - Regulate the possibility for executing situation testing. 		

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Centre for Regional Policy Research and Cooperation “Studiorum”

Nikola Parapunov bb

Kompleks Makoteks 1 kat

POB, 484, 1000 Skopje

Republic of Macedonia

E-mail: office@studiorum.org.mk

Website: <http://www.studiorum.org.mk>